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No. 93-1765

In the Supreme Court of the United States

OCTOBER TERM, 1994

EDWARD R. COLE, PETITIONER

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly dismissed petitioner's appeal for lack of jurisdiction based upon its determination that the Court of Veterans Appeals' remand order did not fall within the collateral order exception to the final decision rule.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 3a-7a) is unpublished, but is noted at 19 F.3d 39 (Table). The order of the Court of Veterans Appeals (Pet. App. 8a-9a) is unpublished, but the decision is noted at 5 Vet. App. 169 (Table). The decision of the Board of Veterans' Appeals (Pet. App. 10a-17a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1994. The petition for a writ of certiorari was filed on May 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a veteran who served on active duty from August, 1950, to March, 1952. Pet. App. 4a, 10a. The Department of Veterans Affairs (VA) has assigned petitioner a combined disability rating of 70% based upon two service-connected disabilities: a gunshot wound to the right leg and post-traumatic stress disorder (PTSD). *Id.* at 4a, 12a, 19a-20a. On October 15, 1990, petitioner applied to the VA for a total disability rating, *id.* at 18a, 25a, but on December 6, 1990, the VA regional office in Detroit, Michigan denied the application. *Id.* at 10a, 25a.

2. Petitioner appealed the VA's decision to the Board of Veterans' Appeals (BVA or Board). On April 3, 1992, the BVA affirmed the VA's decision, *id.* at 10a-17a, concluding that "[u]nemployability due to [petitioner]'s service-connected disabilities has not been demonstrated." *Id.* at 12a; see also *id.* at 11a, 16a. Because petitioner suffers from both service-connected PTSD and nonservice-connected obsessive compulsive personality disorder, *id.* at 14a, the Board concluded that "the objective clinical documentation of record does not establish that [petitioner] is effectively precluded from performing *all* forms of substantially gainful employment, solely as the result of his service-connected disabilities. Rather, the medical evidence reveals that he is at least equally limited by his nonservice-connected psychiatric disorder." *Id.* at 15a.

3. Petitioner appealed the BVA's decision to the Court of Veterans Appeals (CVA). Pet. App. 83a-87a. Among other things, petitioner argued that the BVA had failed to provide adequate reasons and bases for its "conclusory finding" that petitioner is not precluded from all forms of substantially gainful employment. *Id.* at 84a. By order dated April 13, 1993, the CVA vacated

the BVA's decision and remanded "for reasons set forth in the Secretary of Veterans Affairs' brief." Pet. App. 8a.[1] In his brief before the CVA, the Secretary took the position that a remand was necessary because the BVA had "failed to develop in appropriate detail the reasons or bases upon which its decision was grounded as required by *Gilbert* v. *Derwinski*, 1 Vet. App. 49 (1990)." Pet. App. at 30a.[2]

4. Petitioner sought review of the CVA's decision in the court of appeals, arguing primarily that the CVA's remand order was improper because it was done at the behest of the Secretary. Pet. App. 5a. On February 4, 1994, the court of appeals dismissed the appeal on the ground that the CVA's order remanding to the BVA was not a final decision within the meaning of 38 U.S.C. 7292(a) (Supp. IV 1992), the statute authorizing appeals from the CVA to the Federal Circuit. Pet. App. 3a-7a. In so doing, the court rejected petitioner's argument that the remand order fell within the "collateral order exception" to the final judgment rule because the remand order did not resolve any issue completely separate from the merits of petitioner's claim. *Id.* at 6a-7a.

ARGUMENT

1. Petitioner does not contend that the CVA's remand order to the BVA is a final decision; nor did he do so in

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[1] At the same time, the remand order expressly "permit[ted] [petitioner]'s counsel to present any issues deemed necessary for the proper readjudication of [petitioner]'s claim." Pet. App. 8a.

[2] Specifically, the Secretary pointed out that the BVA had failed to set forth the evidentiary basis for its conclusion that petitioner's nonservice-connected personality disorder contributed to his unemployability. Pet. App. 29a. The Secretary also noted that the BVA had failed to analyze the possible impact of emphysema upon petitioner's vocational ability. *Ibid.*

the court of appeals. Pet. App. 5a-6a. Instead, he argues that the remand order is appealable under the collateral order doctrine of *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). In *Cohen* the Court recognized that there exists a

> small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Id. at 546. Subsequently, in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), this Court set forth a three-part test for determining whether a decision falls within the "narrow ambit"[3] of the *Cohen* rule:

> To come within the "small class" of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

437 U.S. at 468. Accord *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 114 S. Ct. 1992, 1995-1996 (1994). The Court has "described the conditions for collateral order appeal as stringent" and has "repeatedly stressed that the 'narrow' exception should stay that way." *Id.* at 1996.

The court of appeals correctly determined that the remand order in this case "cannot be characterized as

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[3] *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 114 S. Ct. 1992, 1994 (1994).

completely separate from the merits of the action," Pet. App. 7a, and hence failed the second prong of the *Coopers & Lybrand* test.[4] As the court of appeals explained, "the CVA's remand order was entered for the express purpose of requiring the Board to supplement the evidentiary record to permit meaningful appellate review of the Board's decision on the merits." Pet. App. 7a. The order thus involved the merits of petitioner's claim and was not completely separate from them.

Petitioner erroneously claims that the court of appeals "held that a remand order could *never* satisfy the criteria for an immediate appeal under the collateral-order exception." Pet. 8 (emphasis added). In fact, the court of appeals recognized that a remand order might be appealable under the collateral order doctrine; however, the court found the doctrine inapplicable to the order in this case. See Pet. App. 6a-7a. Petitioner's broader assertion that the Federal Circuit applies a rule that "remand orders are * * * per se exempt from review," Pet. 10, is also incorrect. Indeed, the Federal Circuit has held in at least one case that a remand order from the CVA to the BVA was immediately appealable. See *Travelstead* v. *Derwinski*, 978 F.2d 1244, 1247-1249 (Fed. Cir. 1992).

Petitioner also argues (Pet. 10) that this case is identical in all relevant respects to *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), in which an immediate appeal of a district court's remand order was allowed. In *Finkelstein*, a widow's application for Social Security disability benefits was denied by the Secretary of Health and Human Services (HHS) on the ground that, under

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[4] The court of appeals assumed, *arguendo*, the satisfaction of the first and third prongs of the *Coopers & Lybrand* test, Pet. App. 6a, as do we.

HHS regulations, her impairment was not of sufficient severity to qualify as a disability; the widow then sought judicial review. The district court, while agreeing that the widow's impairment did not qualify as a disability under HHS regulations, nonetheless remanded for fact-finding regarding her inability to engage in gainful activity. This Court held that the remand order was a "final decision" under 28 U.S.C. 1291 and 42 U.S.C. 405(g) because the district court had set aside "the Secretary's final determination that [the widow] was not entitled to benefits * * * and finally decided that the Secretary could not follow his own regulations in considering the disability issue." *Finkelstein*, 496 U.S. at 625.

The remand order at issue here is not "of the type entered by the District Court in [*Finkelstein*]." *Finkelstein*, 496 U.S. at 623. Cf. *Travelstead*, 978 F.2d at 1249 ("The principal directive of *Finkelstein* is that remands are not all of the same nature."). The key fact in *Finkelstein* was that the district court's order had "essentially invalidated," 496 U.S. at 624, the HHS regulations under which the government had rejected the widow's claim for benefits. See also *id.* at 619 ("We granted certiorari to decide whether the Secretary * * * may immediately appeal a district court order effectively declaring invalid regulations that limit * * * disability insurance benefits and remanding a claim for benefits to the Secretary for consideration without those restrictions."); *Shalala* v. *Schaefer*, 113 S. Ct. 2625, 2635 (1993) (Stevens, J., concurring in the judgment). By comparison, the CVA's order in this case did not have the effect of voiding a legal rule relied upon by petitioner pertaining to the merits of his claim, but merely remanded due to the BVA's failure adequately to explain the reasons and bases for its decision. Furthermore, in

Finkelstein the district court set aside a decision *favorable* to the party seeking immediate appeal; petitioner here wishes to appeal an order vacating a decision *adverse* to him.[5]

2. Petitioner argues (Pet. 10-11) that the CVA's remand order constituted a rejection of his argument that 38 U.S.C. 7252(a) (Supp. IV 1992) bars the CVA from remanding to the BVA at the behest of the Secretary of Veterans Affairs and that he is entitled to appeal that implicit "ruling" under the collateral order doctrine. It is not clear, however, that the remand here "conclusively determine[d] the disputed question," *Coopers & Lybrand*, 437 U.S. at 468, since the CVA did not rule expressly on petitioner's Section 7252(a) argument. More fundamentally, even if the remand order did violate Section 7252(a), it surely cannot be said that the issue of the remand's validity is "too important to be denied review." *Cohen*, 337 U.S. at 546. Remanding to the BVA

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[5] Petitioner—who "apparently concede[d]" in the court below that the remand order was not final, Pet. App. 5a, and does not contend otherwise in this Court—bases his argument on the collateral order doctrine. Pet. i, 8-10. The remand order in *Finkelstein* was held to be appealable, however, not because it was a collateral order, but because it was a final decision. The final decision rule and the collateral order doctrine are closely related, cf. *Digital Equipment Corp.*, 114 S. Ct. at 1995 ("The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in [28 U.S.C.] § 1291, but as a 'practical construction' of it, *Cohen*, *supra*, at 546."), and an analysis of the appealability of a remand order will often yield the same conclusion regardless of which doctrine is applied. Cf. *Finkelstein*, 496 U.S. at 632 (Blackmun, J., concurring in the judgment) (expressing the view that the remand was appealable, not because it was a final decision, but because it was a collateral order). *Finkelstein* is therefore germane to a remand's appealability under the collateral order doctrine.

left petitioner no worse off than he was before remand because the BVA *denied* petitioner's claim in the first instance. If anything, the remand was a windfall to petitioner because it gave him a second chance for a favorable administrative decision.[6]

Petitioner argues (Pet. 11-14) that the remand order is detrimental to him because it will postpone final resolution of his claim. Delay, however, is an inevitable incident of remands and is not an independent reason justifying immediate appealability. See *Digital Equipment Corp.*, 114 S. Ct. at 1996 (appealability "is to be determined * * * without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted, by a prompt appellate court decision") (internal quotation marks, citations, and brackets omitted). Petitioner also attempts (Pet. 11) to liken his Section 7252(a) argument to a double jeopardy or immunity claim, but this Court has rejected attempts to expand the category of immediately appealable collateral orders by analogy to such claims. See *Digital Equipment Corp.*, 114 S. Ct. at 1996-1999.

In any event, petitioner's argument that Section 7252(a) bars the Secretary from seeking a remand is incorrect. Citing no authority other than the text of Section 7252(a) (which we set out in the margin[7]), petitioner asserts that the statute gives him "the

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[6] Furthermore, if on remand the BVA accepts petitioner's claim, 38 U.S.C. 7252(a) (Supp. IV 1992) will bar the Secretary from appealing the decision. See note 7, *infra*.

[7] "The Court of Veterans Appeals shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." 38 U.S.C. 7252(a) (Supp. IV 1992).

exclusive right to define the issues on appeal to the CVA." Pet. 11; see also Pet. App. 88a. The express terms of Section 7252(a), however, forbid the Secretary only from "seek[ing] review" of a BVA decision, not from arguing on a veteran's appeal that it is appropriate to remand the case, a disposition expressly authorized by Section 7252(a)'s third sentence. See note 7, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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